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Teresa McBride-Williams, Timothy Lee McBride v. G. Stedman Huard, M.D., IHC Health Services, Inc., Dixie Regional Medical Center, John Does : Brief of Appellee

Utah Supreme Court

IN THE UTAH SUPREME COURT

TERESA MCBRIDE-WILLIAMS and TIMOTHY LEE MCBRIDE, Plaintiffs and Appellees, vs. G. STEDMAN HUARD, M.D., IHC HEALTH SERVICES, INC., dba DIXIE REGIONAL MEDICAL CENTER, and JOHN DOES 1 through 10, Defendants and Appellant.	**BRIEF OF APPELLEES** Supreme Court Case No. 20020751

APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT, WASHINGTON COUNTY, TRIAL COURT NO. 02-0500090, HONORABLE G. RAND BEACHAM, DISTRICT JUDGE.

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III.

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

1. Utah Code Ann. § 78-14-4. Statute of limitations–Exceptions–Application.

   > (1) No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs . . .

2. Utah Code Ann. § 78-14-8. Notice of intent to commence action.

   > No malpractice action against a health care provider may be initiated unless and until the plaintiff gives the prospective defendant . . . at least ninety days' prior notice of intent to commence an action. . . .Such notice shall be served within the time allowed for commencing a malpractice action against a health care provider. . . .

3. Utah Code Ann. § 78-14-12. Division to provide panel – Exemption – Procedures – Statute of limitations tolled – Composition of panel – Expenses – Division authorized to set license fees.

   > (1)(a) The division shall provide a hearing panel in alleged medical liability cases against health care providers . . .
   >
   > . . . .

c) The proceedings are informal, nonbinding, and are not subject to Title 63, Chapter 46b, Administrative Procedures Act, but are compulsory as a condition precedent to commencing litigation.

. . . .

4. Utah Code Ann. § 78-12-40. Effect of failure of action not on merits.

If any action is commenced within due time and . . . if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff . . . may commence a new action within one year after the . . . failure.

5. Utah R. of Civ. P. 3 – Commencement of action.

(a) *How commenced.* A civil action is commenced . . . by filing a complaint with the court . . . .

IV.

SUMMARY OF ARGUMENT

Utah's Savings Clause allows plaintiffs who commenced their action within the statute of limitations period, but whose action was dismissed otherwise than on the merits, to refile within one year of the dismissal. *See* Utah Code Ann. § 78-12-40.

Appellants argue that the Savings Clause does not apply to Appellee's action because their failure to satisfy Utah Code Ann. § 78-14-12's medical malpractice prelitigation requirements meant that they did not commence their action for purposes of the Savings Clause. *See, e.g.,* Brief of Appellants at p. 12 (plaintiffs' "filing of their Initial Complaint could not and did not commence [their] medical malpractice

action . . . ." (emphasis added)).

In the 1988 case of *Madsen v. Borthick*, 769 P.2d 245 (Utah 1988), this Court made clear that the term "commence," for purposes of the Savings Clause, means filing the complaint, regardless of failure to comply with condition precedent prelitigation requirements. *See id.* at p. 254 (the specific prelitigation requirement for which the case had been dismissed *Madsen* was the requirement that governmental entities be served with a notice of claim). This Court in *Madsen* thus has already clearly defined the meaning of "commence" for purposes of determining whether the Savings Clause applies, having specifically stated: "***In Utah, suits are commenced by the filing of a complaint*** . . . ." *Id.* (emphasis added). Certainly this squares with the straightforward language of Utah R. Civ. P. 3: "A civil action is commenced . . . by filing a complaint with the court . . . ."

The plaintiffs in *Madsen* were thus allowed to refile their case within one year of dismissal, pursuant to the Savings Clause. *See Madsen* at 254. Under the holding and rationale of *Madsen*, therefore, the Appellees in the instant case commenced their action, for purposes of the Savings Clause, by filing their Complaint within the two-year statute of limitations, and they thus were appropriately allowed one year following dismissal to re-file, as were the plaintiffs in *Madsen*.

V.

ARGUMENT

A. *MADSEN* SETS FORTH THE MEANING OF "COMMENCE" FOR PURPOSES OF APPLICATION OF THE SAVINGS CLAUSE: *"COMMENCE" MEANS FILING THE COMPLAINT.*

In *Madsen*, this Court defined "commence" as used in the Savings Clause, Utah Code Ann. § 78-12-40, in the context of plaintiffs whose actions are dismissed for failure to satisfy prelitigation requirements which are considered conditions precedent to the commencement of the action (the specific requirement which the *Madsen* plaintiffs failed to fulfill was service of a notice of claim on governmental entities). *See* 769 P.2d 245, 249-51, 54. The Court rejected the *Madsen* defendants' argument that the *Madsen* plaintiffs' failure to comply with prelitigation requirement, which was conditions precedent to commencement of the action,[1] (very similar to the language of the prelitigation panel requirement statute, § 78-14-12) meant that the plaintiffs had not commenced their action and thus were not entitled to refile within

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[1]In footnote 6 on page 249, the *Madsen* Court explains that the governmental entity notice requirement of Utah Code Ann. § 63-30-11-12 (1979) is a precondition to suit, as demonstrated by negative implication from the use of contrasting language regarding the governmental employee notice requirement, *see id.,* which stated that notice to governmental employees "is not a condition precedent to the commencement of an action" (emphasis added) (the negative implication being that notice to governmental entities is a condition precedent to the commencement of an action.) Failure to serve the required notice on the governmental entities involved was the reason the first suit was dismissed in *Madsen*, yet the *Madsen* Court still held that the plaintiffs had commenced their litigation for purposes of the Savings Clause and thus could re-file within one-year of the dismissal.

the Savings Clause's one year grace period. The Court stated:

> [Defendants argue] that section 78-12-40 does not apply to this case because the [plaintiffs] failed to file the required notice of claim in the first suit and such a filing was necessary for them to "commence" the prior suit "within due time," as section 78-12-40 requires. [Defendants'] argument is without merit. ***In Utah, suits are commenced by the filing of a complaint*** or the service of a summons, not by the filing of a notice of claim, which is more properly classified as a precondition to suit than as the means of commencing a suit. *See Foil v. Ballinger,* 601 P.2d at 149-50; Utah R. Civ.P. 3(a).

See id. at p. 254. The Court's citation to Utah R. Civ. P. 3 is worth emphasis. That Rule is as follows:

> Rule 3 – Commencement of action.
> (a) *How commenced.* A civil action is commenced . . . by filing a complaint with the court . . . .

Based on the key holding quoted above, which in turn is based upon the simple and straightforward language of Utah R. Civ. P. 3, the *Madsen* Court determined that the plaintiffs who had failed to comply with a mandatory precondition to suit, and who had thus seen their complaint get dismissed, had nonetheless commenced their suit for purposes of the Savings Clause. The Court thus allowed the plaintiffs to refile within the Savings Clause's one-year grace period. *See id.* (Indeed the *Madsen* Court emphasized that the failure to comply with the condition precedent stripped the Court of jurisdiction and thus requiring dismissal, and that it was this lack of jurisdiction which rendered the dismissal as being otherwise than on the merits so as to allow for refiling without offending principles of preclusion.)

Simple and straight forward application of the *Madsen* ruling dictates that the

Appellees in the instant case commenced their suit for purposes of the Savings Clause by filing their Complaint within the original statute of limitations period (it is undisputed that they filed their Complaint within the original statute of limitations period), and that when their case was dismissed for failure to satisfy prelitigation requirements, they were entitled under the Savings Clause to refile within one year (there is no dispute that the refiling occurred within one year of dismissal). *See* Utah Code Ann. § 78-12-40 ("If any action is commenced within due time and . . . the plaintiff fails in such action . . . otherwise than upon the merits, ... he may commence a new action within one year . . ."); *Madsen*, 769 P.2d at 254 (holding that for purposes of the Savings Clause, "In Utah, suits are commenced by the filing of a complaint.")

B. APPELLANTS' ARGUMENTS REGARDING THE LANGUAGE OF § 78-14-12 FAIL TO NULLIFY THE SIMPLE AND STRAIGHT FORWARD HOLDING OF *MADSEN* REGARDING THE MEANING OF "COMMENCE" AS USED IN THE SAVINGS CLAUSE.

Appellants argue that the language in the statute setting forth the medical malpractice prelitigation panel requirement, Utah Code Ann. § 78-14-12, should be interpreted so as to foreclose application of the Savings Clause.

Their arguments are unpersuasive.

1. Appellee's Statutory Interpretation Arguments Fail to Trump *Madsen*'s Clear Defining of "Commence" for Purposes of Applying the Savings Clause.

Appellees write at length about what they believe is the meaning and intent of Utah Code Ann. § 78-14-12. However, their statutory interpretation arguments regarding § 78-14-12 do not address the key issue of the Savings Clause and *Madsen*'s clear defining of the term "commence" therein. The applicability of the Savings Clause is the central issue, and the holding of *Madsen*, as discussed above, clearly resolves in Appellees' favor the issue of whether Appellees "commenced" their litigation for purposes of the Savings Clause.

Thus, Appellees' statutory interpretation arguments regarding Utah Code Ann. § 78-14-12 really miss the point. Properly understood, the strong language used in § 78-14-12 to describe the prelitigation panel requirement, i.e. "compulsory" and "condition precedent," used in § 78-14-12 does not contravene or negate the Savings Clause or *Madsen*, but rather provides emphasis and support for the proper conclusions that the prelitigation panel requirement is a conditions precedent to filing suit and that suits filed without prior compliance must be dismissed, just as did the strong language used in the governmental entity notice requirement in the suit dismissed in *Madsen*. *See Madsen*, 769 P.2d at 249, n. 5-6 (*see* footnote 1, *supra*). Appellants' arguments beg the question whether the Savings Clause applies to cases thus dismissed. This question is answered by *Madsen*, which Appellees conspicuously ignore. Appellee's extrapolations from rulings of courts from other

states should be discarded in favor of the straight forward application of this Court's own holding in *Madsen*.[2]

2. Under *Standard Federal Savings*, the Savings Clause Applies Unless the Legislature Makes Plain an Intention to Bar Claims Forever. Section 78-14-12 Does Not Even Address the Savings Clause, Let Alone Make Plain an Intention to Bar Forever Claims of Those Who Fail to Comply.

In the case of *Standard Federal Savings and Loan Association v. Kirkbride*, 821 P.2d 1136 (Utah 1991), this Court held that in considering whether a statute which sets forth a prelitigation requirement allows those who file without first complying therewith the opportunity to correct their noncompliance and refile,

> The relevant inquiry is whether the ***legislature made plain an intention to bar forever*** claims of those who are guilty of a procedural misstep.

Id. at 1138 (emphasis added). Section 78-14-12 does not even address the issue of refiling or the Savings Clause, let alone make plain an intention to foreclose application of the Savings Clause and bar forever dismissed claims in contravention of the Savings Clause. Appellants strenuously urge the Court to read into § 78-14-12 such a legislative intention, but at best the statute is subject to differing

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[2]Appellants state that the 1985 legislation which implemented the prelitigation panel requirements at issue in this case superceded prior cases which allowed application of the Savings Clause, namely *Foil v. Ballinger*, 601P.2d 144 (Utah 1979). *See* Appellant's Brief at p. 23, n. 3. They do not cite case law nor legislative history documenting this assertion. It is worth noting, in this regard, that *Madsen* was decided three years after the legislation in question, in 1988. *Madsen*'s defining of "commence" for purposes of the applying the Savings Clause so as to allow for refiling of cases dismissed for failure to comply with conditions precedent to commencement of the action, should be applied to cases dismissed for failure to comply with § 78-14-12.

interpretations, and certainly does not "***make plain***" an intention to "***bar forever***" such claims, as would be required under the *Standard Federal* standard.[3]

The language of § 78-14-12 is correctly interpreted as requiring that cases filed without prior compliance therewith must be dismissed; in other words, the failure cannot be excused by the court, nor can the court allow a plaintiff to fulfill the requirement belatedly while the action is pending or stayed; the case must be dismissed. In other words, the compulsory, condition precedent nature of § 78-14-12's prelitigation requirement means that complaints filed without fulfillment thereof must be dismissed, not that the Savings Clause does not and cannot apply thereafter. *Madsen* makes this distinction clear, holding that the Savings Clause applies to cases timely commenced, regardless of failure to satisfy conditions precedent to commencement of the action (and that "commence" means filing the complaint. *See Madsen* at 249-50, n. 5-6, and 254.

Section 78-14-12 does clearly set out a mandatory condition precedent for commencing a suit, which means that a suit commenced without satisfaction of that compulsory, condition-precedent prelitigation requirement must be dismissed.[4]

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[3]It would be simple for the legislature to make such an intention plain. As merely one example of a statement which would make such an intention plain, the legislature could have included the following language: "Cases dismissed for failure to comply with the prelitigation panel requirement of § 78-14-12 may not be refiled pursuant to § 78-12-40."

[4]The Appellants make an attempt to extrapolate meaning and impact which would negate the Savings Clause from the use of the word "commence" in the language of § 78-

While semantical arguments may be made, as Appellants have endeavored to

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12-14 (arguing that it is not the filing of the complaint which "commences" litigation, but the proper compliance with the prelitigation panel requirement followed by filing of the complaint), but their proposed meaning runs contrary to *Madsen*. Under *Madsen*, lawsuits are commenced by the filing of the complaint, regardless of the failure to satisfy a mandatory pre-condition to commencement of the suit which would thus require dismissal thereof. The mandatory pre-condition nature of the prelitigation requirement means that the suit commenced without compliance must be dismissed. *See Madsen* at 136.

In addition to the fact that the Defendants' argument regarding the word "commence" runs contrary to *Madsen*, there is no Utah Supreme Court case law directly supporting Defendants' contra-*Madsen* meaning for "commence." To the contrary, there is Utah Supreme Court case law which suggests the use of the word "commence" in § 78-12-14 means nothing more than its plain meaning as set forth in the Utah Rules of Civil Procedure (and followed in *Madsen*) (*see* Rule 3, providing as follows: "Commencement of action. (a) *How commenced.* A civil action is commenced . . . by filing a complaint with the court . . . .") The plain and simple meaning of "commence" as used in § 78-12-14, i.e. the initiating of the lawsuit by filing the complaint, and the incorrectness of twisting its meaning into something which would defeat the Savings Clause, is borne out in the case of *Malone v. Parker*, 826 P.2d 132 (Utah 1992). (Given *Madsen*, no further "bearing out" is necessary, but nonetheless *Malone* is worth noting.) In *Malone* this Court interpreted and ruled upon § 78-12-14 and ***three times*** used the word "initiate" in place of the actual term used in § 78-12-14 ("commence"), thereby casting serious doubt upon any interpretation of the "commence" which would transform it into anything other than the simple meaning of starting or initiating the lawsuit by filing the complaint in Court. *See Malone*, 826 P.2d at 133, 135, 136. This interchangeability of "commence" and "initiate" suggests that § 78-12-14 simply means what it says – litigants must satisfy the prelitigation panel requirement before starting their suit in court. Litigants who fail to meet that requirement will have their cases dismissed. Indeed this is reflected in exactly what the Utah Supreme Court did in the *Malone v. Parker* case: it ruled that § 78-12-14 required proper satisfaction of the prelitigation panel requirement prior to bringing suit, and thus that a suit brought without satisfaction thereof was properly dismissed. *See* 826 P.2d at136; *see also id.* at 134 (not only did the plaintiff in *Malone* fail to properly comply with § 78-12-14, but she also failed to file her complaint within the original statute of limitations; the plaintiff thus had no argument for application of the Savings Clause because she did not timely file her complaint, and the savings clause was thus, presumably, not raised by plaintiff).

do, to attempt to advance interpretations of § 78-14-12 which would somehow negate the applicability of the Savings Clause, in light of *Madsen* and *Standard Federal*, these semantical arguments should be rejected.

C. SOUND POLICY CONSIDERATIONS UNDERPIN THE SAVINGS CLAUSE AND *MADSEN.*

The Savings Clause and *Madsen* make sense from a public policy standpoint and represent a fair and just approach. It is sound public policy that the substantive interests of justice be served where possible through adjudication of claims based upon their merits, and some allowance for the correction of dismissals based otherwise than upon the merits serves that public policy.[5]

The Savings Clause and *Madsen* by no means excuse nor protect claimants against all errors and delays; to the contrary, they only provide limited relief to those claimants who, whatever other errors they make, nonetheless go to the court and file their complaint prior to the statute of limitations deadline. Those who fail to do so have no remedy nor protection. *See, e.g., Malone v. Parker*, 826 P.2d 132, 134 (plaintiff failed to properly comply with § 78-14-12, and also failed to file her complaint within the original statute of limitations, and her claims were barred).

Furthermore, the "filing of the complaint" standard under the Savings Clause and *Madsen* provides a bright line for determining which cases may be saved (only

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[5]It is worth noting, further, in this regard that the Appellees were acting *pro se* when their missteps under Utah Code Ann. § 78-14-12 occurred.

those cases in which the complaint was timely filed but dismissed otherwise than upon the merits, and only so long as they are properly re-filed within one year of dismissal). This is a clear test which allows for clear analysis, and it avoids the murkiness of Appellants' semantical attempts to imbue § 78-14-12 with meaning which would negate application of the Savings Clause by circumventing the straight forward holding of *Madsen* regarding the meaning of "commence" for purposes of the Savings Clause.

VI.

CONCLUSION

The ruling of the District Court should be affirmed. The Appellees commenced their action within the statute of limitations period by filing their Complaint. They refiled within one year following dismissal otherwise than on the merits. The Savings Clause applies. Their claims should be adjudicated on the merits.

DATED THIS 18th day of February, 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 18th day of February, 2003, I caused to be served by first class U.S. Mail, postage prepaid, two true copies of the foregoing Brief of Appellees to be served upon the following:

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